No. 80-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD HIDALGO, SECRETARY OF THE NAVY,
Petitioner

v.

ALICE NAKSHIAN,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF RESPONDENT

JAMES R. ROSA
General Counsel
American Federation of Government Employees (AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

MARY E. JACKSTEIT
Staff Counsel
American Federation of Government Employees (AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

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AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF RESPONDENT

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the American Federation of Government Employees files this Brief as *amicus curiae* in support of the Respondent.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees, AFL-CIO (AFGE) is an unincorporated association representing approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees including the so-called blue collar, white collar and professional groups of employees located in nearly every major department and agency of the federal government.

In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints including court actions, and carries on legislative activity to improve the welfare of the employees it represents. One of the subjects of these activities is equal employment opportunity. AFGE is committed to full opportunity for all employees of the federal government and opposes discrimination on the basis of age, race, sex, color, religion, national origin and handicap. Therefore, AFGE is keenly interested in the rights of federal employee litigants under the Age Discrimination in Employment Act. In addition, AFGE upholds the principle that in the area of equal employment opportunity the federal government as an employer bears no fewer obligations and responsibilities than do employers in the private and other public sectors.

SUMMARY OF ARGUMENT

Section 15 of the Age Discrimination in Employment Act of 1967 *as amended*, (ADEA), 29 U.S.C. § 633a, was correctly read by the court of appeals to provide for a right to trial by jury in actions brought by federal employees under that section.

Examination of the language of section 15(c) of the ADEA requires a conclusion that the grant of a right to trial by jury was made by Congress. Provision is made for "legal" as well as "equitable" relief. In *Lorillard* v. *Pons*, 434 U.S. 575 (1978) this Court apprehended the significance of Congress' use of the term "legal" in section 7(c) of the ADEA, 29 U.S.C. § 626(c), where it appears in the same context as it does in section 15(c). The Court noted the difference between this enforcement provision and that of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e, where no similar term of art is utilized. In fact, contrary to the Petitioner's assertions, comparison of sec-

tion 15 to its counterpart in Title VII suggests an intentional distinction between the two statutes in the provisions relating to relief. The emphasis placed upon the use of the word "legal" by the court of appeals is supported by congressional usage and by this Court's previous decisions not only in this, but other contexts. *Curtis* v. *Loether*, 415 U.S. 189 (1974).

In addition to the inclusion of the word "legal" in section 15, the court of appeals also correctly found significance in the grant of jurisdiction over federal employee ADEA actions to the district courts. This grant is particularly telling in light of Congress' authorization for legal relief. In the absence of a provision to the contrary, the grant of jurisdiction to a district court to sit as a court of law suggests a right to trial by jury.

There is nothing in the legislative history of either the original 1974 amendments to the ADEA, extending coverage to federal employees, or of the 1978 amendments, which suggests a congressional intent contrary to that which appears from the language of the statute.

The concerns which dictated Congress' approach in amending the ADEA to cover federal employees in much the same way it amended Title VII of the Civil Rights Act, relate to administrative, not judicial enforcement. As already noted, with respect to judicial enforcement the provisions of section 15(c) and its counterpart in Title VII are significantly dissimilar. As to the amendments made in 1978, Congress' preoccupation at that time was with reducing the incidence of mandatory retirement. In that regard, Congress went further in protecting federal employees than it did for others, by eliminating completely any upper age limit for coverage by the ADEA. To insure that this expanded protection would be effective, Congress included a provision adding subsection (f) to section 15, making it clear that no limitation in any other portion of the ADEA would apply to

section 15. Initiated completely apart from these amendments to section 15 was a change to section 7 of the ADEA, 29 U.S.C. § 626, making clear the right to trial by jury in suits brought pursuant to that section. The change was aimed at resolving a conflict among the circuit courts of appeal over whether a right to trial by jury existed under section 7. The omission of any comparable change to section 15 reflects only the specificity of the amendment and not any determination to deny jury trials in section 15 cases.

In any event, section 15 of the ADEA, prohibiting age discrimination in the federal government and prescribing the enforcement responsibilities and rights deriving from that prohibition, cannot be seen as existing in a vacuum. In order to determine what will "effectuate the purposes" of the ADEA, courts should not be barred from looking to other statutory provisions in order to determine Congress' intent with regard to the rights to be accorded in connection with civil actions brought by federal employees.

Statutes are to be interpreted in light of their purpose. Congress has made clear its view that in the area of equal employment opportunity the federal government, as an employer, is fully obliged to eradicate and remedy unlawful discrimination and is subject to the same duties as are private employers and other public employers. This Court is asked by Petitioner in this case to accept the position, contrary to this general view, that when sued under the ADEA, the federal government ought not to be subject to the same manner of judicial enforcement as other employers. Such a position cannot be credibly maintained.

There is no presumption against jury trials in actions against the United States and the court of appeals properly rejected such a proposition. The doctrine of sovereign immunity does not govern this question and a court is not bound to find an affirmative and unequivocal

grant of a right to trial by jury. Once immunity from suit has been waived by the federal government, as it clearly is in section 15(c) of the ADEA, a court approaches the question of the existence of a right to trial by jury as an ordinary one of statutory interpretation. It is true that Congress may condition a waiver of immunity but it would appear that where Congress has wanted to deny trial by jury as a condition for suit it has expressly done so. It was proper for the court of appeals, in the absence of a clear statutory provision proscribing trial by jury, to determine whether the statute expressly, or by fair implication, provides for such a right. The conclusion of the court of appeals that a congressional intention to confer a right to trial by jury in cases under section 15 of the ADEA may be inferred from the language of the statute is correct and should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY INTERPRETED SECTION 15 OF THE ADEA TO ACCORD A RIGHT TO TRIAL BY JURY.

A. The Language of Section 15 Creates a Right to Trial by Jury.

1. *Section 15(c) Provides for "Legal" as well as "Equitable" Relief.*

In *Lorillard* v. *Pons*, 434 U.S. 575 (1978) this Court, in deciding that private employees have a right to trial by jury when suing their employers under section 7(b) of the ADEA (29 U.S.C. § 626(b)), found it significant of Congress' intention that provision for "legal" as well as "equitable" relief was made. 434 U.S. at 583. Speaking for the Court, Justice Marshall recognized the word "legal" as a term of art connoting a proceeding in which a right to trial by jury is normally to be accorded. Congress was deemed to be cognizant of the meaning of the

word when including it in the provisions of the ADEA. *Id.* at 583. Particular note was taken of the absence of the same or any similar term in the remedial provisions of Title VII of the Civil Rights Act despite other strong resemblances between that statute and the ADEA. Justice Marshall stated in this regard:

> There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive provisions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII. But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.
>
> Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII.

434 U.S. at 584 (footnote omitted). Although the Court was comparing in particular section 7(b) of the ADEA (29 U.S.C. § 626(b)) and 42 U.S.C. § 2000e-5(g), which govern actions against non-federal employers, the same differences exist between section 15(c) of the ADEA and its counterpart in Title VII (section 717(d), 42 U.S.C. § 2000e-16(d)). Section 15(c) provides for "legal relief" whereas section 717(d) (incorporating § 2000e-5(g)) does not.

Upon the rationale that Title VII accords only equitable remedies, the majority of courts considering the issue have decided that there is no right to jury trial in Title VII cases.[1] Based on this precedent, Petitioner argues

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[1] *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410, 410-411 (8th Cir. 1978) (other cases cited showing that majority of circuits have denied jury trial); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975) (no jury trial under Title VII because section

that the similarities between section 15 of the ADEA and section 717 of Title VII suggest an intention to deny trial by jury in actions under section 15. Pet. Br. at 26. Petitioner fails to note, however, the significant differences in the respective provisions relating to relief discussed in *Lorillard* and cited above. Given the extent to which Congress drew on section 717 in writing section 15 of the ADEA, departures from Title VII must be viewed as intentional. As Justice Marshall remarked in the *Lorillard* decision, "to the extent petitioner correctly interprets congressional intent with respect to jury trials under Title VII, the very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind in drafting the later law." 434 U.S. at 585 n. 14.[2] It is likely that, if Title VII contained the wording of the ADEA relative to relief available to an aggrieved employee, courts which have denied trial by jury in actions under that statute would have reached different results.[3]

Although this Court's decision in *Lorillard* rested on statutory and not constitutional grounds, 434 U.S. at 577, the importance placed upon the express provision for legal relief is consistent with *Curtis* v. *Loether*, 415 U.S. 189 (1974) decided a few years earlier. In *Curtis* this

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706(g) does not authorize damages but only equitable remedies); *Brown* v. *Frito-Lay, Inc.*, 15 FEP Cases 1055, 1059 (D. Kan. 1976) ("the statute speaks of awarding equitable relief").

[2] The court of appeals in its decision in this case, while focusing on the express language of the statute did note in the legislative history evidence that Congress considered jury trials specifically appropriate in age discrimination cases. Pet. App. 12a-13a, n. 6 (citing remarks of Senator Kennedy).

[3] *See generally Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1266 (1971). ("The addition of a compensatory damage remedy [to Title VII] . . . would present legal issues constitutionally requiring a jury trial").

Court held that the Seventh Amendment of the Constitution applies to actions enforcing newly created statutory rights and remedies that are legal in nature. 415 U.S. at 194. The court of appeals' reliance in this case on the appearance of the words "legal relief" in section 15(c) is therefore well founded.[4]

2. *Section 15(c) Places Jurisdiction of Actions Brought Against the Federal Government in the District Courts.*

In addition to the provision for "legal relief", the court of appeals found import in the grant to the district courts of jurisdiction over actions brought pursuant to section 15(c). Pet. App. at 10a-11a.

Congress may confer jurisdiction of an action against the United States upon the Court of Claims, or upon a district court sitting as a court of law or equity, as a court of claims or as a court of admiralty. "Absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court of law carries with it a right of jury trial." 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2], at 38-239 (1980 ed.). Courts of claims and courts of admiralty traditionally and by express rule conduct their proceedings without juries. 28 U.S.C. § 2402; 46 U.S.C. § 742; Fed. R. Civ. P. 38.

As has been indicated in the foregoing section, *see* p. 6, *infra*, with respect to suits against the United States under section 15(c) of the ADEA, district courts are specifically authorized to provide legal relief and, therefore, to sit as courts "of law". As a result, the grant

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[4] *See also Franquez* v. *United States*, 604 F.2d 1239, 1243 n. 14 (9th Cir. 1979) (in determining whether jury trial proper in proceedings under 42 U.S.C. § 1424c, court placed significance on use of the terms "fair compensation" and "fair market value", words commonly used in condemnation proceedings where juries are traditional).

of jurisdiction to the district courts in such cases is significant. As the court of appeals notes in its decision, Pet. App. at 10a-11a, this Court has itself inferred a congressional intent to permit jury trials in an action against the federal government from the fact that jurisdiction is in the district courts. *United States* v. *Pfitsch*, 256 U.S. 547 (1921); *Law* v. *United States*, 266 U.S. 494 (1925).

B. Nothing in the Legislative History Reveals an Intent by Congress to Deny the Right to Jury Trial in Cases Brought Under Section 15 of the ADEA.

Petitioner has in a sense "placed the cart before the horse" in its brief to the Court. Before addressing the actual language of section 15 which the court of appeals found persuasive of the existence of a right to trial by jury, Petitioner argues extensively the legislative history of the ADEA and section 15, which it alleges precludes any inference that Congress intended to grant such a right. Of course, as Petitioner acknowledges, Pet. Br. at 16, the starting point in any task of statutory construction is the language of the act. This language, as we have argued in the preceding section, supports the inference drawn by the court of appeals. Even so, looking at the legislative history cited by Petitioner, we do not agree that it establishes an intention contrary to that reflected in the language of the ADEA itself.

1. *The 1974 Amendments.*

Petitioner argues that because, in amending the ADEA in 1974 to cover federal employees, Congress created a separate section 15, to a large extent modeled after section 717 of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-16, Congress thereby demonstrated an intention to deny federal employees the right to jury trial. Pet. Br. at 25-26. But to the contrary, Congress created a separate section and looked to Title

VII in drafting it for reasons which shed no light whatever on the question of trial by jury.

When Congress decided to create a new section of the ADEA to cover federal employees, it was indeed following the same approach it used when amending Title VII. In both instances the motivation for this approach was preservation of existing administrative complaint procedures. Prior to the time Title VII was amended to cover federal employees, discrimination in federal employment was banned by Executive Order 11478, 34 Fed. Reg. 12985 (1969), *as amended* 36 Fed. Reg. 7831 (1971), *reprinted in* 42 U.S.C. § 2000e at 286, and the Civil Service Commission had in place administrative procedures for the acceptance and processing of complaints of discrimination by employees.

When Congress decided to include federal employees in Title VII, it was out of concern that the executive order program had been ineffectual,[5] and that relief in the courts was virtually impossible to obtain in the absence of a statutory authorization for suits by federal employees. H.R. REP. NO. 92-238, 92nd Cong., 1st Sess. 23-25 (1971), *reprinted in* [1972] U.S. CODE AD. & CONG. NEWS, 2137, 2157-60. The House passed legislation (H.R. 1746) that would have eliminated Civil Service Commission authority over equal employment matters and transferred federal employee administrative complaints to the Equal Employment Opportunity Commission (EEOC), the responsible agency for non-federal employee programs. *Id.* at 25. However, the final measure did not take that approach. Rather, the Senate Bill (S. 2515), which was substituted for the House version, retained program authority for federal employee discrimination complaints in the Civil Service Commission based apparently on a concern for the EEOC's workload and on a belief that

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[5] *See Morton* v. *Mancari*, 417 U.S. 535, 547 (1974).

the Civil Service Commission was committed to doing a better job. S. REP. No. 92-415, 92nd Cong., 1st Sess. 12-16 (1971). Thus, section 717 as enacted, accommodated an already existing administrative framework for the handling of complaints of discrimination by federal employees and was aimed at improving but not eliminating this framework. Congress did insure a remedy in court, if these administrative procedures did not resolve or remedy unlawful practices.

When the ADEA was amended in 1974 to cover federal employees, once again accommodation of the existing administrative procedures was made and age discrimination complaints were simply engrafted to the existing equal employment program administered by the Civil Service Commission. 29 U.S.C. § 633a(b); 39 Fed. Reg. 24351 (1974), *reprinted in* 29 C.F.R. §§ 1613.501-.521. This is not surprising given that in the same 1974 legislation when Congress amended the Fair Labor Standards Act (FLSA) to cover federal employees it placed responsibility for administering the FLSA in this area with the Civil Service Commission rather than with the Department of Labor. Pub. L. No. 93-259, § 6, 88 Stat. 55 (1974), *codified in* 29 U.S.C. §§ 203(d), (e), (x), 204(f). This was in recognition of the pay authority already exercise by the Civil Service Commission. S. REP. No. 93-690, 93rd Cong., 2nd Sess. 23 (1974). Thus, in drafting a separate section of the ADEA for federal employees and placing federal ADEA enforcement with the Civil Service Commission, Congress was simply following a consistent pattern of deferring to existing administrative schemes.

The only possible conclusion from this legislative history is that the manner in which the ADEA was amended in 1974 to cover federal employees, i.e., by creation of a new, separate section 15, does nothing to elucidate Congress' intent on the question of jury trials in court actions

brought by such employees.[6] It is quite obvious that Congress was concerned with retaining and utilizing existing administrative procedures. With regard to judicial enforcement, the language of section 15 of the ADEA departed from section 717 of Title VII to a significant degree. *See*, p. 6, *infra*.

2. ***The 1978 Amendments.***

In 1978 Congress further amended the ADEA. In the legislation as it was finally passed (Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189), appear two provisions which Petitioner urges this Court to read together to find a definitive expression of Congress' intention to deny to litigants under section 15 a right to trial by jury. Pet. Br. at 26-29.

One of these provisions is an amendment to section 15 adding subsection (f).[7] This section was added in conjunction with the amendment to section 12 removing an age limit for federal employment. Congress' primary purpose in making the 1978 amendments was to address what Congress perceived to be the inequity of mandatory retirement imposed by employers, including the federal government, on workers who but for their age are able

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[6] This is further illustrated by the fact that Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781 (1978), *reprinted in* 42 U.S.C. § 2000e-4, transferred to the EEOC administrative enforcement of the ADEA for *both* federal and non-federal sectors. Thus authority originally vested in the Civil Service Commission and the Department of Labor by the ADEA now rests with the same agency.

[7] Pub. L. No. 95-256, § 5(e), *codified in* 29 U.S.C. § 633a(f).

Section 15(f) states, "Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section."

and willing to work. H.R. REP. No. 95-527, Part I, 95th Cong., 1st Sess. 1 (1977); S. REP. No. 95-493, 95th Cong., 1st Sess. 1 (1977).

The House of Representatives initiated an amendment to lift entirely the upper age limit for federal employees covered by the ADEA. H.R. 5383, § 5(c); H.R. REP. No. 95-527 at 16. The House Report indicates that the Committee on Education and Labor was concerned that the newly expanded group of federal employees not be denied the full protection of the ADEA. In particular the Committee was concerned with provisions remaining in the ADEA which, in regard to the non-federal sector, preserve restrictions on upper age-limit employees. *Id.* at 11. The Committee enumerated two specific restrictive provisions of which it was wary, namely, section 12(a), 29 U.S.C. § 631(a), providing coverage of the ADEA to employees between the ages of forty and seventy, and section 4(f), 29 U.S.C. § 623(f), exempting bona fide retirement programs.[8] Examination of the Act in full indicates that there are possible others: section 11(f), 29 U.S.C. § 630(f), which exempts from the ADEA certain policy level employees; section 12(c), 29 U.S.C. § 631(c), which permits the mandatory retirement of employees between the ages of 65 and 70 who are in executive or high policymaking positions if they are entitled to immediate retirement benefits; and section 12(d), 29 U.S.C. § 631(d), which permits compulsory retirement of employees of institutions of higher education if they are between the ages of 65 and 70. The Committee also was concerned with court decisions holding that the ADEA had not superseded other federal statutes im-

[8] "Section 15 of the act which prohibits employment discrimination on account of age in Federal Government employment is complete in itself. *Restrictions and limitations* in other parts of the act, such as paragraph (a) of section 12 and paragraph (f) of section 4 do not apply to section 15" (emphasis added). H.R. REP. No. 95-527 at 11.

posing mandatory retirement ages. H.R. REP. No. 95-527 at 5.

To address the above concerns, therefore, in H.R. 5383 the Committee provided not only for the amendment of sections 12 and 15(a) to remove the upper age limit on those federal employees covered by the Act, but also for a new section 15(f) that was to make it clear that limitations in the rest of the provisions of the ADEA do not apply to section 15. H.R. REP. No. 95-527 at 11, 16.

The other provision of the 1978 amendments noted by Petitioner is one making an addition to section 7 of the ADEA (29 U.S.C. § 626). In the Senate version of H.R. 5383 was added an amendment by Senator Kennedy aimed, as the court of appeals notes in its decision, Pet. App. at 12a-13a, at resolving a conflict then existing in the circuit courts of appeal over the presence of a right to trial by jury under the ADEA. At that time all of the conflicting circuit court decisions involved suits brought against private employers under section 7. *Lorillard* v. *Pons*, then pending in this Court, also involved section 7. Senator Kennedy's amendment, which was adopted by the Senate, 123 CONG. REC. S17297 (daily ed. Oct. 19, 1977), and by the Conference Committee in modified form, H.R. CONF. REP. No. 95-950, 95th Cong., 2d Sess. 3 (1978), added to section 7 an express grant of the right to trial by jury. This is now codified in 29 U.S.C. § 626(c)(2).

There is no indication in the legislative history of the 1978 amendments that Congress considered denying jury trials in actions against the federal government. The two amendments discussed above (the addition of section 15(f) and the amendment to section 7) were not viewed as related. In fact, they became effective on different dates. Like the amendments to section 15(a) and 12(a) lifting the upper age limit for federal employees, and reflecting its relationship to those sections,

section 15(f) was given an effective date of September 30, 1978, six months beyond the date of enactment. Pub. L. No. 95-256 § 5(f), 92 Stat. 192.[9] On the other hand, the jury trial amendment to section 7 took effect for actions filed after the date of enactment.

C. Section 15 of the ADEA Does Not Exist in a Vacuum.

It should be apparent that section 15(c) authorizing "aggrieved" persons to file civil actions against the federal government will, given its brevity and relationship to the rest of the Act,[10] be the subject of future judicial interpretation as to the manner in which these actions are to be brought and as to the scope of relief which is available.

The predictable issues for judicial resolution include class action certification,[11] attorneys fees,[12] statute of limi-

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[9] The six month delay in these provisions becoming effective was an addition of the Senate Conferees. H.R. CONF. REP. NO. 95-950, 95th Cong., 2d Sess., 10-11 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS, 528, 532.

[10] In its entirety section 15(c) states: "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." 29 U.S.C. § 633a(c). Section 15(d) provides in part: "When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days notice of an intent to file such action". 29 U.S.C. § 633a(d). *Compare with* 29 U.S.C. §§ 626(b), (c), and 42 U.S.C. §§ 2000e-16(c), (d). Section 2000e-16(d) states: "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder".

[11] *Moysey* v. *Andrus*, 481 F. Supp. 850 (D.D.C. 1979) (deciding that class actions may be certified under Rule 23; opt-in provision of the FLSA followed in private ADEA cases is not applicable).

[12] *DeFries* v. *Haarhues*, 488 F. Supp. 1037, 1044-5 (C.D. Ill. 1980) (rejecting the government's argument that neither attorneys fees nor costs are payable under section 15(c) since not expressly provided for, and due to the provisions of section 15(f)).

tations and notice requirements,[13] damages,[14] and exhaustion of administrative remedies.[15]

Interestingly, the federal government has taken conflicting positions in arguing these various issues. In some cases it has maintained that section 15 must be read as incorporating the enforcement procedures of the FLSA. On this basis it has argued for the dismissal of claims for compensatory damages (since liquidated damages are recoverable), and motions for class action certification under Rule 23 of the Federal Rules of Civil Procedures, *Moysey* v. *Andrus*, 481 F. Supp. at 852. In other cases the opposite position has been taken, i.e., that section 15 is completely separate from the rest of the ADEA. In this manner the federal government has opposed not only jury demands, as in this case, but also claims for attorneys fees and costs, *DeFries* v. *Haarhues*, 488 F. Supp. at 1044.

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[13] Section 15 provides no time limit for filing a civil action following the receipt of a final administrative decision where an administrative complaint has been filed with the EEOC. In contrast, the Fair Labor Standards Act, whose statute of limitation (29 U.S.C. § 255) is incorporated by 29 U.S.C. § 626(e) into section 7 of the ADEA, requires an action to be brought within two years from the date the action accrued (three years if violation is wilful). Title VII, 42 U.S.C. § 2000e-16(c), requires a civil action to be filed within 30 days of a final decision of the EEOC or the agency. The general statute of liimtation for suits against the government is six years, 28 U.S.C. § 2401. At the present time, EEOC advises complainants to follow the FLSA provisions.

[14] *Braswell* v. *Kobelinski*, 428 F. Supp. 324, 325 n. 1 (D.D.C. 1976) (indicating dismissal of the plaintiff's claim for compensatory damages without explanation).

[15] *Compare Bunch* v. *United States*, 548 F.2d 336, 340 (9th Cir. 1977) (holding that plaintiff had to exhaust administrative remedies before filing civil action) *with Hall* v. *United States*, 436 F. Supp. 505, 508 (D. Minn. 1977) (no exhaustion of administrative remedies is required). *See also Trammell* v. *Callaway*, 415 F. Supp. 212, 216 (D. Miss. 1976) (dismissed action for failure to complete administrative procedure).

A considered reading of section 15 reveals that although the section is, to a large extent, discrete from the rest of the ADEA, there is no basis for proceeding as if it exists in a vacuum. Courts should be permitted to look beyond the section for guidance as to Congress' purpose with regard to enforcement actions against the federal government. Section 15(c) provides that relief is to be accorded such as *"will effectuate the purposes of this Act"* (emphasis added). "The Act" must refer to the entire ADEA since section 15 was not passed as a separate act but, indeed, as an amendment to the original ADEA. Thus, it should be possible for a court to determine in any particular instance whether, consistent with the motive with which Congress made section 15 distinct from the rest of the ADEA, it can be concluded that Congress also deemed certain measures provided elsewhere in the ADEA to be essential for the effectuation of the purposes of the Act.[16] Those purposes are the banning of discrimination on the basis of age in employment and the provision for full and effective remedies where such discrimination is found to have occurred.

D. Congress Intends, with Regard to Employment Discrimination, that the Federal Government be on the Same Footing as Other Public and Private Employers.

Statutes are to be construed "in the light of their purpose", *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940). In amending the Age Discrimination in Employment Act (ADEA) to extend coverage to federal employees, Congress' purpose was to provide to such employees

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[16] This was the approach taken by the court in *DeFries* v. *Haarhues*, 488 F. Supp. 1037, 1044-5 (C.D. Ill. 1980), to reject the defendant's argument that recovery of attorneys fees and costs could not be made under section 15(c). The court found by looking at the rest of the ADEA that Congress obviously believed such recovery necessary to effectuate the purposes of the Act.

the legal protections already enjoyed by private employees. To this end, Congress imposed upon the federal government the same obligations and liabilities as those borne by private and other public sector employers.[17] The Report of the House Committee on Education and Labor on H.R. 12435 states with regard to this amendment, "[t]he Committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the federal, and local government levels, as it has and continues to do in private employment". H.R. REP. No. 93-913, 93rd Cong., 2d Sess. 40-41 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 2811, 2850. The report on the Senate version of the same Bill (S. 2747) clarifies that the original exclusion of federal employees from the ADEA did not reflect any desire to deny federal employees protection from age discrimination. S. REP. No. 93-690, 93rd Cong., 2d Sess. 55 (1974). In fact, prior even to the passage of the ADEA, President Lyndon Johnson declared that, in affording equal employment opportunities for older employees, the federal government would provide "maximum leadership". Exec. Order No. 11141, 29 Fed. Reg. 2477 (1964).

Accepting Petitioner's arguments in this case would require the Court to adopt the position that Congress intends the federal government to enjoy greater protection from the consequences of discriminatory policies and practices than non-federal employers. In view of the legislative history not only of the ADEA but of other equal

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[17] "[T]he legislative history makes it clear that Congress intended the federal government to have both the same obligations and flexibility as do private employers." *Mason* v. *Lister*, 562 F.2d 343, 345 (5th Cir. 1977). *Accord, Bradley* v. *Kissinger*, 418 F. Supp. 64, 69 (D.D.C. 1976), 436 F. Supp. 134 (D.D.C. 1977) (three judge court), *rev'd on other grounds sub nom. Vance* v. *Bradley*, 440 U.S. 93, (1979) (district court concluded that comparable protections are created for federal employees as exist for nonfederal employees).

employment legislation, this position cannot be credibly maintained. Clearly, in extending the ADEA to cover federal employees, Congress was continuing the approach it took when similarly amending Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e. This Court, in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) determined that in making those Title VII amendments Congress had as a principal goal to grant to federal employees the "full rights" available to private sector employees (at 841). *Accord*, *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974) ("In general it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government"). *See*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-2 n. 14 (1977).[18]

II. THERE IS NO AUTOMATIC PRESUMPTION AGAINST JURY TRIALS IN CASES AGAINST THE UNITED STATES; THE COURT OF APPEALS CORRECTLY APPROACHED THE CASE AS ONE INVOLVING AN "ORDINARY QUESTION OF STATUTORY INTERPRETATION" AND ITS TASK AS THAT OF DETERMINING WHETHER THE STATUTE EXPRESSLY OR BY FAIR IMPLICATION PROVIDES FOR A TRIAL BY JURY.

Petitioner asks this Court to enunciate for the first time a principle that "the grant of a right to trial by jury in suits against the federal government, [must] like the consent to suit itself, be 'unequivocally expressed' ", Pet.

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[18] Following this approach the lower courts have, in Title VII actions against the federal government, found directly applicable the burden of proof formulations of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Whiteside* v. *Gill*, 580 F.2d 134, 138 (5th Cir. 1978); and of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Douglas* v. *Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975), both of which involved suits against private employers. *See also* *Barnes* v. *Costle*, 561 F.2d 983, 988 (D.C. Cir. 1977) and *Parks* v. *Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975).

Br. at 15. It is Petitioner's view that, whether by direct application or not, the doctrine of sovereign immunity must "inform the Court's decision in this case". Pet. Br. at 15-16 n. 7. The absence of authority cited for such a rule is notable.

The Court of Appeals correctly found Petitioner's argument to rest on a "serious misconception" about the scope of the doctrine of sovereign immunity and held that once immunity to suit is waived (which it unquestionably is here, by section 15(c) of the ADEA), in the absence of specific procedures or conditions attached to that waiver, it is for the courts to determine the type of trial intended by Congress, without entertainment of a presumption either for or against trial by jury. Pet. App. at 8a-9a. Finding no explicit provision on the latter subject in section 15 of the ADEA, the court proceeded to determine whether authorization of a trial by jury could be fairly implied from the statute. Pet. App. at 9a. At this stage of inquiry, the court of appeals considered the doctrine of sovereign immunity to have "drop[ped] out of the picture". Pet. App. 9a n. 4.[19]

Sovereign immunity protects the federal government from suit except where permission to sue is expressly granted. That is settled law. Although at its inception this doctrine may have been supported by what are now considered archaic notions of the sovereign's invincibility,

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[19] Such an approach was taken by the 9th Circuit in the case of *Franquez* v. *United States*, 604 F.2d 1239 (1979) where the issue was the right to a trial by jury in a case brought under a statute governing the review of claims respecting land acquired by the United States government on Guam (42 U.S.C. § 1424c). The statute was silent on the question of jury trial and the Government argued, as it does here, that an express statutory authorization was required. The Court of Appeals rejected that argument and held that the district court had not exceeded its jurisdiction in granting a jury trial, once sovereign immunity was waived, based on what it felt was a fair implication of the statute (at 1243).

today the doctrine is maintained in the interests of protecting the government from undue interference with public funds and operations. Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 HARV. CR-CLL REV. 322, 333 n. 61 (1975), citing *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). *See generally Edelman* v. *Jordan*, 415 U.S. 651 (1974). As a practical matter, the doctrine may simply express the separation of powers between the three branches of government, protecting the legislature from challenges to its law-making powers by the courts unless the legislature has expressly allowed it. Abernathy, *supra*, at 359-60. In any case, in its application, the doctrine is one that limits or describes the scope of a court's jurisdiction, *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941), and the type of relief that can be sought, *United States* v. *Testan*, 424 U.S. 392, 403 (1976), in a suit against the federal government.

It is difficult to see in what manner the trial of factual issues by either judge or jury legitmately relates to the concerns that arise when the federal government is sued. A jury has no greater power to interfere with government monies or operations than a judge; nor does a jury represent any greater challenge to the legislature's law-making authority. Likewise, the presence of a jury does not expand the jurisdiction of a court nor enlarge the type or scope of relief that can be granted.

Petitioner argues that in the context of an age discrimination suit, Congress would be concerned that the participation of a jury might expand the federal government's potential liability due to a bias by jurors to regard the federal government as a "deep pocket",[20] and that this

[20] In the current economic situation when the public (and potential jurors) are aware of the existence of high government spending, the national debt and the impact of these phenomena on the

fact necessitates the same cautious judicial approach required when waivers of sovereign immunity are considered. Pet. Br. at 13-14.

But Petitioner fails to explain why, if indeed motivated by such a concern, Congress would not have similarly protected state and municipal governments from jury trials as well. Congress did not do that, however, and the 1978 amendment to 29 U.S.C. § 626(c), Pub. L. No. 95-256 § 4(a)(2), 92 Stat. 190, and the decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), unquestionably affirm the availability of a jury trial in suits against these public employers.

The Petitioner's arguments would also lead one to believe that a judge, in an ADEA suit, is without power to grant a motion for summary judgment where there are no real issues of fact, FED. R. CIV. P. 56, or for judgment not withstanding a verdict, where the jury's award is unreasonable, FED. R. CIV. P. 50(b). Of course, this is not the case. Petitioner's argument that requiring trial to the court without a jury "conserves the public fisc", Pet. Br. at 15, is at best pure speculation.[21]

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economy in general and on them as taxpayers, there may in fact be no basis upon which to project a "deep pocket" mentality among jurors. In general, federal employees appear not to enjoy the sympathy of the public at the present time.

[21] In its Petition for a Writ of Certiorari, Petitioner also argued that jury trials should be cautiously accorded because of the impact on the courts' calendars due to the time required to try such cases. In the case of *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) this Court faced a similar argument when the issue was the right to jury trial in landlord-tenant cases in the District of Columbia. The Court's response was to "reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to a jury trial" (at 384) and to state further that, "[s]ome delay . . . is inherent in any fair-minded system of justice" (at 385).

There is no question that in passing section 15 of the ADEA and thereby authorizing suits against the federal government, Congress had the power to impose, and could have imposed, restrictions or conditions on its consent to suit. Congress has had no difficulty in making such conditions and limitations quite explicit in other statutes. *See* 28 U.S.C. § 2402 (providing no jury trials in actions brought under the Federal Tort Claims Act and Tucker Act, 28 U.S.C. §§ 1346(a)(2), (b)); 28 U.S.C. §§ 2501-21 (prescribing procedures for the Court of Claims); and 46 U.S.C. §§ 742-45 (setting rules governing suits in admiralty against the United States including a provision for "nonjury proceedings" in § 742).

From this basic proposition, that Congress may condition its consent to suit, Petitioner would have the Court *presume* that Congress has imposed a condition when none is clearly provided in the statute. Such an argument is not supported by the cases Petitioner cites. *McElrath* v. *United States*, 102 U.S. 426 (1880) merely affirmed that Congress could permissibly condition a suit in the Court of Claims on the absence of a trial by jury, as it could in other ways prescribe the forms of pleading and rules of practice even where the government-defendant might assert counterclaims against the plaintiff. But as already noted, Congress explicitly set the condition of non-jury trial in what is now 28 U.S.C. § 2402. *United States* v. *Sherwood*, 312 U.S. 584 (1941) held that in giving concurrent jurisdiction over claims against the government to the district courts as well as the Court of Claims, Congress did not expand the waiver of sovereign immunity made by the Tucker Act. The Court incidentally cited the holding of *McElrath*. 312 U.S. at 587.

Other cases cited by Petitioner for the proposition that limitations and conditions on the Government's consent to suit are to be strictly construed, Pet. Br. at 15, likewise involve express limitations, in these instances, time limits

for filing suits under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), (*United States* v. *Kubrick*, 444 U.S. 111 (1979)), and in the Court of Claims, 28 U.S.C. § 2501 (*Soriano* v. *United States*, 352 U.S. 270 (1957)).

Petitioner seems not to appreciate the incongruity of basing a rule requiring an affirmative provision for jury trial on instances where Congress has, rather, affirmatively *denied* jury trial. It seems significant that Congress felt it particularly necessary to provide an express denial with regard to the Tucker Act and the Federal Tort Claims Act, both of which, like section 15 of the ADEA, permit recovery against the United States of legal forms of relief.[22] Contrary to what Petitioner argues, it may be more appropriate to conclude that when Congress has waived its immunity from suit for actions where legal relief is recoverable and thus the right to trial by jury would suggest itself, it has deemed it necessary to make express any intention that cases are to be tried by the courts alone.[23]

In summary, in the absence of a provision in section 15 of the ADEA concerning the right to trial by jury, the Court of Appeals was correct in rejecting any presumption against such a right and determining Congress' intent from a fair implication or inference from the statute. *Wickwire* v. *Reinecke*, 275 U.S. 101, 105 (1927) (dictum).

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[22] 28 U.S.C. §§ 1491 and 1346(a)(2) give the courts jurisdiction to award "liquidated and unliquidated damages" in contract and non-tort actions. 28 U.S.C. §§ 2674 and 1346(b) make the United States liable for torts in the same manner as private individuals and specifically authorize the award of compensatory money damages.

[23] *See also Chandler* v. *Roudebush*, 425 U.S. 840, 862 n. 37 (1976) where this Court noted that although a trial *de novo* will not be presumed in suits brought following administrative procedures, in most instances where Congress does not intend for a trial *de novo* it so indicates by the use of appropriate terms of art.

CONCLUSION

For the reasons stated the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MARY E. JACKSTEIT
Staff Counsel
American Federation of
Government Employees
(AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

JAMES R. ROSA
General Counsel